RECENT CASES

ADMIRALTY—SALVAGE—VOLUNTARINESS OF SALVOR.—The plaintiffs, former officers of the British Army on their way to join the Army of Northern Russia, were at Murmansk when that port was seized by the Bolshevists. In order to save their lives, they seized the defendants' steamship which was lying at the port, and escaped to Norway, although they could have escaped by sleigh. In an action by the plaintiffs to recover salvage remuneration, the defendants contended that there was lack of voluntariness which was essential to salvage. *Held:* The plaintiffs were volunteers and can recover. The Lomonosoff, 37 T. L. R. 151 (1920).

Salvage is compensation given to persons by whose assistance a vessel or her cargo is saved from impending danger or loss. Gonzales v. United States, 42 Court of Claims Rep. 299 (1907); Cope v. Vallette Dry Dock Co., 119 U. S. 625 (1887). It is said that the assistance rendered must be voluntary. The Fannie Brown, 30 Fed. 215 (1887). This element of voluntariness is satisfied by the absence of any contractual or official obligation except in the case of a passenger on board the vessel in distress. Thus, seamen are not ordinarily entitled to salvage for saving their own vessel. Gilbraith et al. v. Stewart Transp. Co., 121 Fed. 540, 57 C. C. A. 602 (1902); The Neptune, 1 Hagg. Adm. 227 (Eng. 1824). Nor can public servants recover for salvage where they are employed by the public authorities to perform the very service for which they are endeavoring to recover. Davey v. The Mary Frost, 7 Fed. Cas. No. 3592, 2 Woods 306 (1876). On the other hand, the crew of a vessel may recover for performing salvage services to another vessel. The Sappho, L. R. 3 P. C. 690 (Eng. 1871). Or they can recover for performing salvage service to their own vessel after it has been abandoned. The Le Jonet, L. R. 3 A. & E. 556 (Eng. 1872). Likewise, public servants may recover for salvage when the services rendered are beyond the duties which they are required to perform. Le Tigre, 15 Fed. Cas. No. 8281, 3 Wash. C. C. 567 (1820). However, it is held that a passenger on board a ship in distress is unable to claim as salvor except in extraordinary circumstances. The Vrede, 1 Lush. 322 (Eng. 1861); The Branston, 2 Hagg. Adm. 3, n. (Eng. 1826). The reason is that it is the duty of every one on board the vessel to give all the assistance he can. The Vrede, *supra.*

In the principal case, the plaintiffs were neither passengers, nor were they under any pre-existing contractual or official duty to render salvage services to the defendants' steamship. The decision, therefore, would seem correct. The fact that they seized the vessel in order to save their lives should make no difference, since it is held that it is no objection to a claim for salvage that the assistance of the salvor did not arise from a desire to preserve the property or benefit the owner, his motive being immaterial. Le Tigre, *supra;* The B. C. Terry, 9 Fed. 920 (1881), *semble.* In the former case, the court said: "The owner, whose property has been preserved from destruction by the acts of a stranger, has no right to inquire into the motives which influenced his con-

duct, provided he acted legally." Thus it would seem that if the plaintiffs in the principal case could have escaped only by seizing the defendants' vessel, the element of voluntariness necessary to recover for salvage would still be satisfied.

BILLS AND NOTES—PURCHASING BANK, CREDITING DEPOSITOR'S ACCOUNT, A HOLDER FOR VALUE—ADDITIONAL DEPOSITS.—Without knowledge of existing defects in the payee's title, plaintiff bank purchased defendant's note from the payee and credited his checking account therewith. The payee maintained his credit with plaintiff by additional deposits; but before the note's maturity and before plaintiff had notice of defects, the payee withdrew an amount greater than his credit was immediately after plaintiff's purchase. *Held:* Plaintiff was a holder in due course. State Savings Bank of Leavenworth v. Krug, 193 Pac. 899 (Kan. 1920).

In the United States a transferee bank which merely credits the transferor's account with the amount of a negotiable instrument does not thereby give such value as is required of a holder in due course. Citizens' State Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33 (1905); Merchants' National Bank v. Marden, Orth & Hasting's Co., 125 N. E. 384 (Mass. 1919); Clayton v. Bank of East Chattanooga, 85 So. 271 (Ala. 1920).

But it is well established that in such circumstances a bank is a holder in due course if by such credit an antecedent debt has been cancelled, Swift v. Tyson, 16 Pet. 1 (U. S. 1842); Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416 (1890); or if the transferor exhaust the credit by subsequent withdrawals before the bank learns of infirmities in the instrument. Hamilton National Bank v. Emigh, 127 Ark. 545, 192 S. W. 913 (1917); Old National Bank of Spokane v. Gibson, 105 Wash. 578, 179 Pac. 117 (1919); N. I. L., Sec. 25 and 52.

The operation of this rule is unaffected by additional deposits by the transferor, even though his credit has thereby been kept at all times greater than the amount of the instrument, because withdrawals from a checking account are charged against deposits in the order in which they were made. Fredonia National Bank v. Tommei, 131 Mich. 674, 92 N. W. 348 (1902); First National Bank v. McNairy, 122 Minn. 215, 142 N. W. 139 (1914).

The decision of the principal case is thus in accord with the recognized rule; but when such credit has been only partially drawn upon before notice, there is a split of authority on the question of the amount that may be recovered on the instrument. Some courts hold that a substantial withdrawal gives a bank the rights of a holder in due course, and that it may therefore recover the full value of the instrument, Amalgamated Sugar Co. v. U. S. National Bank of Portland, 187 Fed. 746, 109 C. C. A. 494 (1911); Bland v. Fidelity Trust Co., 71 Fla. 499, 71 So. 630 (1916); and it has been suggested that any withdrawal has the same effect. Security Bank of Minn. v. Petruschke, 101 Minn. 478, 112 N. W. 1000 (1907). But the better view, which is the one adopted by the N. I. L., is that in such circumstances a bank is a holder for value only *pro tanto*. Dresser v. Construction Co., 3 Otto 92 (U. S. 1876); National Bank of Phoenixville v. Bonsor, 38 Pa. Super. Ct. 275 (1909); N. I. L., Sec. 27.

This question does not arise in England since it is there held, by a strict logical development of the Law Merchant, that merely crediting the trans-

feror's account with the amount of a negotiable instrument constitutes a transferee bank a holder for value. Carstairs v. Bates, 3 Campbell 301 (Eng. 1812); Royal Bank of Scotland v. Tottenham, (1894) 2 Q. B. D. 715; Bills of Exchange Act (1882) 45 & 46 Vict., Ch. 61 s. 27 (1) a.

CARRIERS—DELIVERY OF GOODS WITHOUT SURRENDER OF BILL OF LADING. The plaintiff shipped a consignment of goods on a "consignor's order" bill of lading. It attached thereto a draft, and sold both, indorsed in blank, to a bank. The bank wrongfully detached the draft and forwarded the bill of lading. On arrival, the consignment was delivered by the terminal carrier to a bona fide holder of the bill, but surrender of the bill of lading was not required, contrary to an express surrender clause therein. The plaintiff brought an action against the initial carrier, alleging that the terminal carrier's acts constituted a conversion of the goods. *Held:* The loss was not the result of the failure on the part of the carrier to take up the bill of lading, and therefore the defendant is not liable. Pere Marquette Ry. Co. v. J. F. French & Co., 41 Sup. Ct. 195 (U. S. 1921).

The Federal Uniform Bills of Lading Act, 39 U. S. Stat. at Large 538 (1916), does not impose on the carrier a duty to the shipper to take up the bill of lading. Does the delivery to the rightful holder of the bill of lading without compliance with the surrender clause of that bill render the carrier liable for conversion?

This is the first time that the question has come before the United States Supreme Court. In discussing it the opinion indicates that although there is a conflict in the language of the cases yet the decisions are in accord. Continuing, they point out that where the failure to take up the bill of lading was the cause of the loss recovery has been allowed and cite the following cases: Babbitt v. Grand Trunk Ry. Co., 285 Ill. 267, 120 N. E. 803 (1918); Judson v. Minneapolis and St. Louis R. R. Co., 131 Minn. 5, 154 N. W. 506 (1915); Turnbull v. Mich. Cent. R. R. Co., 183 Mich. 213, 150 N. W. 132 (1914); First Nat. Bank v. Oregon-Washington R. & N. Co., 25 Idaho 58, 136 Pac. 798 (1913); and where it was not the cause of the loss recovery has not been allowed and cite, Famous Mfg. Co. v. Chicago & Northwestern Ry. Co., 166 Iowa 361, 147 N. W. 754 (1914); Nelson Grain Co. v. Ann Arbor R. R. Co., 174 Mich. 80, 140 N. W. 486 (1913); Chicago Co. v. Savannah Ry. Co., 103 Ga. 140, 29 S. E. 698 (1897).

It is interesting to note that in none of the cases cited in support of the first proposition was there a delivery to the holder of the bill; in three of the cases delivery was made to the consignee named in the bill, he having failed to get possession of the bill of lading, and in the fourth, in which the bill of lading was a consignor's order bill, to the person who was to be notified on arrival of the goods. In each of these cases, therefore, there was a delivery to one who was not legally entitled to the goods. On the other hand, in the cases cited under the second proposition there was a delivery to the holder of the bill, which was a delivery to the person legally entitled to the goods. It is suggested that this distinction is more sound than that indicated by the court.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FORFEITURE OF PROPERTY OF INNOCENT OWNER FOR VIOLATION OF THE INTERNAL REVENUE LAW.—The defendant company sold an automobile, retaining the title for the unpaid purchase money, to a taxicab operator, who, unknown to the defendant, used the car for the removal of distilled spirits upon which a tax was imposed by the United States and had not been paid. Under Sec. 3450, Rev. St. (Comp. St. Sec. 6352), providing for the forfeiture of every conveyance under such circumstances, a libel was filed against the automobile. The defendant company gave bond and was permitted to replevy the car. *Held:* The United States can recover the value of the car from the defendant. Grant Co. v. United States, 41 Sup. Ct. 189 (1921).

The United States Circuit Court of Appeals, in accord with the decision of the Supreme Court in the principal case, has consistently held that an automobile, carriage, cart, etc., committed by the owner to the possession of a third person, who uses it in the removal of goods or commodities to defraud the United States of a tax imposed thereon, is subject to forfeiture under Sec. 3450, Rev. St. (Comp. St. Sec. 6352), although the owner had no knowledge of such illegal use. United States v. Mincey, 254 Fed. 287, 165 C. C. A. 575 (1918); United States v. One Saxon Automobile et al., 257 Fed. 251, 168 C. C. A. 335 (1919); Logan v. United States, 260 Fed. 746, 171 C. C. A. 484 (1919). Under similar statutes it had been held by the Supreme Court that the property was forfeited whether the owner knew of its unlawful use or not. Dobbin's Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637 (1877); United States v. Stowell, 133 U. S. 1, 33 L. Ed. 555 (1889). The reason is that if one could protect his property from forfeiture on proof that the legal title was in some one else, the difficulty of enforcing the law would be greatly increased and the penalty of forfeiture almost always evaded. United States v. One Saxon Automobile et al, *supra.*

The decision of the principal case, in view of the above authorities, is undoubtedly correct. It is interesting, however, considered in connection with the fifth amendment of the United States Constitution which prohibits the taking of property without due process of law. In discussing this point, the decisions almost invariably proceed on the ground of precedent. In Logan v. United States, *supra*, the court said: "The long history of forfeitures in this country, for violation of internal revenue and custom laws, of property, regardless of ownership, whether innocent or guilty, repels the idea that such forfeitures conflict with the owner's right to due process of law." The true reason would seem to be the one stated in the principal case, that such provision was necessary to provide against breaches of the revenue laws.

CONSTITUTIONAL LAW—SIXTEENTH AMENDMENT—DEFINITION OF INCOME—REALIZED CAPITAL INCREASE OF PERSONALTY.—The plaintiff sued to recover the amount of a tax, paid under protest, assessed under the Federal Income Tax Act of 1916, on the difference between the market value on March 1, 1913, of certain corporate shares which he owned on that date, and the amount realized by their sale in 1917. *Held:* The District Court properly sustained the demurrer to the declaration, as that which is here taxed is income within the meaning of the Act and the Sixteenth Amendment. Merchants' Loan and Trust Co. v.

Smietanka, Collector, No. 608, October Term, 1920, U. S. Supreme Court, decided March 28, 1921.

For a full discussion of Walsh, Collector v. Brewster, No. 742, Oct. Term, 1920, decided at the same time on the authority of the foregoing case, see 69 U. of Pa. Law Rev. 253.

In these cases an unanimous court reiterates, as the constitutional definition of "income," that laid down in Stratton's Independence v. Howbert, 231 U. S. 399, 415 (1913), and supplemented in Eisner v. Macomber, 252 U. S. 189, 207 (1920)—"the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."

The contentions that a trustee was not a "taxable person" within the meaning of the Act and that the Act did not contemplate the taxation of such a gain were answered by citing the language of the Act. To the contention that such a gain was not income to the private investor but only to the dealer, the court replied that no such distinction had ever been recognized by the Federal Government in statute, judicial decision or departmental practice, and they refused now "to enter into the refinements of lexicographers and economists." Of Gray v. Darlington, 15 Wall. 63 (1872), upon the authority of which the lower court decided Walsh v. Brewster, *supra*, it was said that differences in statutes rendered quotations from that case inapplicable.

In Goodrich v. Edwards, Collector, No. 663, Oct. Term, 1920, decided at the same time, and in Walsh v. Brewster, *supra*, the tax was levied in certain instances on the difference between the value of stocks and bonds as of March 1, 1913, and the amount realized by their subsequent sale, though this latter amount was actually less than the original cost to the investor. Quoting the Act and the definition in Eisner v. Macomber, *supra*, the court points out that the statute imposes the tax on the proceeds of the sale of personal property to the extent only that *gains* are derived therefrom by the vendor.

CONSTITUTIONAL LAW—STATUTE MUST PRESCRIBE ASCERTAINABLE STANDARD OF CONDUCT—LEVER ACT INVALID.—The defendant was indicted under the Lever Act (Act of October 22, 1919, 41 Stat. L. 397), the indictment being laid in the words of the statute which made it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." No standard was set by the statute as to what constituted a just or reasonable charge. On the defendant's demurring to the indictment, *held*, demurrer sustained, as the statute denied the defendant due process of law and violated the guarantee of the Sixth Amendment in that it did not prescribe an ascertainable standard of guilt whereby an accused might know the nature and cause of the accusation lodged against him. United States v. L. Cohen Grocery Company, Adv. Op. Supreme Court No. 324, October Term, 1920.

The majority of the lower Federal courts had upheld the validity of this particular provision of the Lever Act. 69 Univ. of Pa. Law Review 60. In the instant case, however, an unanimous vote of the Supreme Court declared the provision invalid, the decision apparently viewing the case as being controlled by International Harvester Co. v. Kentucky, 234 U. S. 216 (1913), wherein it was decided that a state statute which made it unlawful to enhance or depreci-

ate the price of a commodity either above or below its "real value" was invalid under the Fourteenth Amendment. The court brushed aside with little or no comment the contention of the government that the statute was valid in view of the decision in the case of Nash v. United States, 229 U. S. 373 (1912), in which it was held that criminal prosecutions might be instituted under the Sherman Act for "unreasonable restraints of trade." It would appear that no standard of reasonableness was set by the latter statute, an objection which was the basis of the decision in the principal case.

EVIDENCE—COMPETENCY OF DIVORCED WIFE TO TESTIFY AGAINST HER HUSBAND—PRIVILEGED COMMUNICATIONS.—In an action for alienation of affections, begun after divorce, the defendant offered the plaintiff's divorced wife as a witness. *Held:* That after the marital relation has been terminated, a statute prohibiting the testimony of either spouse against the other without the other's consent, excludes only privileged communications. Patterson v. Hill, 180 N. W. 352 (Mich. 1920).

At common law, testimony by either spouse against the other was excluded, except in actions based on the commission of a personal wrong by one spouse against the other. Co. Litt. 6, b (1628); Lord Audley's Case, 3 How. St. Tr. 401 (Eng. 1631); 1 Bl. Com. 443 (1768); Davis v. Dinwoody, 4 T. R. 678 (Eng. 1792); Whipp v. State, 34 Ohio St. 87 (1877). This rule was based on the probable danger of causing marital dissensions by admitting such testimony, and on a natural repugnance of fair-minded people to convicting one spouse on the other's testimony. Barker v. Dixie, Lee cas. t. Hardwicke 264 (Eng. 1736); Mills v. U. S., 1 Pinney 73 (Wis. 1839); Wigmore on Ev., sec. 2228 (1904).

Neither of these reasons would apply after the termination of the marital relation; and so it was generally held that after a divorce or the death of one spouse, the testimony of one spouse against the other was admissible, even though it related to facts which occurred during the continuance of the marital relation. Mercer v. Patterson, 41 Ind. 440 (1872); Stephens v. Cotterell, 99 Pa. 188 (1881); State v. Mathews, 133 Iowa 398, 109 N. W. 616 (1907); Curd v. State, 217 S. W. 1043 (Tex. 1920). But this conclusion was not always accepted. Kimbrough v. Mitchell, 1 Head 539 (Tenn. 1858); State v. Kodat, 158 Mo. 125, 59 S. W. 73, 81 Am. St. Rep. 292, 51 L. R. A. 509 (1900).

"Confidential communications" between husband and wife were always privileged at common law, and it was generally held that all communications between husband and wife should be presumed confidential until proved otherwise. Doker v. Hasler, R. & M. 198 (Eng. 1824); Robin v. King, 2 Leigh 140 (Va. 1830); Stein v. Bowman, 38 U. S. 209 (1839); Owen v. State, 78 Ala. 425 (1885).

This rule has been codified in almost every jurisdiction, and frequently the element of confidence is not expressly named in the enactment: "any communications" are privileged; *e. g.*, N. H. Pub. Laws, c. 224, sec. 20 (1901); 1 Burns Ann. Stats. Ind., sec. 520, sub-sec. 6 (1914). Such a statute is sometimes construed as extending the privilege even to communications proved not to have been intended to be confidential. Campbell v. Chace, 12 R. I. 333 (1879); Leppla v. Tribune Co., 35 Minn. 310, 29 N. W. 127 (1886). But the

weight of authority favors a limitation of the privilege to confidential communications. Hagerman v. Wigent, 108 Mich. 192, 65 N. W. 756 (1896); Sexton v. Sexton, 129 Iowa 487, 105 N. W. 314, 2 L. R. A. (N. S.) 708 (1905); Kraeger v. Kraeger, 125 N. E. 484 (Ind. 1919).

Some statutes expressly extend the privilege to "transactions" which came to the spouse's knowledge by reason of the marital relation. 3 Gen. Code of Ohio, sec. 11494 (1910); Thompson's Shannon's Code of Tenn., sec. 5596 (1910). But in the absence of such a statute, most courts grant the privilege only to verbal and written communications. Harlan v. Moore, 132 Mo. 483, 34 S. W. 70 (1895); *In re* Est. of Van Alstine, 26 Utah 193, 72 Pac. 942 (1903); *In re* Pusey's Est., 181 Pac. 648 (Cal. 1919).

Some courts, however, extend it to include such transactions without the aid of a statute, holding, apparently, that knowledge of a fact acquired in the marital relation, whether by communication of information by the other spouse, participation in a transaction, or mere observation and inference, has passed through a confidential channel, which deserves the protection of the privilege. Perry v. Randall, 83 Ind. 143 (1882); Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820 (1896); Allcock v. Allcock, 174 Ky. 665, 192 S. W. 853 (1917).

The decision in the principal case is in accord with the best modern view; but it is apparent that the term "privileged communications" needs precise definition. It is suggested that a limitation of the privilege to confidential communications, and the exclusion from the privilege of mere transactions between husband and wife would provide the most satisfactory basis for such a definition.

EVIDENCE—INADMISSIBILITY OF SUBSEQUENT ACT TO PROVE CRIMINAL INTENT.—A physician was indicted for the offense of murder by abortion. To prove a criminal intent, and to rebut the defense of necessity, the prosecution introduced evidence to show that several months later, the prisoner performed a similar operation upon the same woman. *Held:* The evidence was inadmissible, since it was not proved that the child was quick. The subsequent act not being indictable, it cannot be used to prove the intent of the abortion charged. State v. Bassett, 194 Pac. 867 (N. M. 1921).

The general rule is that when a man is put on trial for one crime, proof of his guilt of other crimes must be excluded. 1 Bishop's New Cr. Proc., Par. 1120. But when the proof of other acts or crimes tends to establish motive, intent, or absence of mistake or accident, it is generally admissible. People v. Molineaux, 168 N. Y. 264, 61 N. E. 286 (1901); Wharton's Crim. Ev. 848.

In the principal case, the court refused to admit the evidence because the second act did not constitute the indictable offense of abortion. This decision is against the great weight of authority, the courts admitting evidence of other acts, regardless of whether or not they are technically indictable as crimes. Clark v. People, 224 Ill. 554, 79 N. E. 941 (1906); People v. Seaman, 107 Mich. 348, 65 N. W. 203 (1895). It is only necessary that both acts should be substantially similar in character. State v. Hyde, 234 Mo. 200, 136 S. W. 316 (1910).

The reasoning of the court in the principal case, it is submitted, clearly shows a misconception of the general rule stated above. Proof of any act,

conduct, or declarations of an accused person is admissible if it tends to establish intention, knowledge or motive, and it is not necessary that they should be criminally indictable. In fact, they are all the more admissible if they are not, since they are less likely to prejudice the jury.

EVIDENCE—STATEMENT OF INTENTION AS PART OF THE RES GESTAE.—The deceased man, for whose murder the defendant was indicted, told his wife, when leaving home about an hour before he met his death, that he intended to meet the defendant. *Held:* That this statement was admissible in evidence as part of the *res gestae*. Commonwealth v. Palma, 268 Pa. 434, 112 Atl. 26 (1920).

Declarations of one's own present-existing state of mind, made in a natural manner and not under circumstances of suspicion, are generally held admissible to prove the state of mind, whenever it is relevant, either as a fact in issue in the case, or as evidence from which, in turn, a fact in issue can be inferred. Doe d. Shallcross v. Palmer, 16 Q. B. 747 (Eng. 1851); Com. v. Trefethen, 157 Mass. 185, 31 N. E. 961 (1892); Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 U. S. Sup. Ct. 909 (1892); Farrar v. Locomotive Engineers' Mut. Life & Accident Ins. Assn., 173 N. W. 705 (Minn. 1919); *In re* Carson's Est., 194 Pac. 5 (Cal. 1920). Since the declarations are admitted to prove the facts stated therein, their admission constitutes an exception to the rule against hearsay. Coleman v. Southwick, 9 John. 45 (N. Y. 1812); Wigmore on Ev., sec. 1361, 1768.

This exception is analogous to the exception in favor of spontaneous statements of present-existing physical pain: both kinds of statements are admitted because the circumstances under which they were made gives them a credibility actually greater than could be attributed to direct testimony as to the facts they assert, if such direct testimony were available. DuBost v. Beresford, 2 Camp. 511 (Eng. 1810); Ins. Co. v. Mosley, 8 Wall. 397 (U. S. 1869); Wigmore on Ev., sec. 1714.

However, some courts disregard the existence of the well-founded exception to the rule against hearsay in favor of declarations of present-existing state of mind, and endeavor to relate such a declaration to some act, independently material to the issue in the case whose legal meaning was uncertain or indefinite. If the declaration can be related to an act which in the court's opinion satisfies these requirements, it is admitted as "part of the *res gestae*." Viles v. Waltham, 157 Mass. 542, 32 N. E. 901 (1893); State v. Giudice, 170 Iowa 731, 153 N. W. 336 (1915); McKay v. McKay, 189 S. W. 520 (Tex. 1916). If not, it is excluded. Com. v. Felch, 132 Mass. 222 (1882); Chicago & E. I. R. Co. v. Chancellor, 165 Ill. 438, 46 N. E. 269 (1897). In the principal case, the statement of the deceased's intention was related to his act in leaving his home, but this act, taken by itself, had no real productive value in determining the issue, whether or not he was murdered by the defendant. Where courts refuse to recognize the exception admitting declarations of a mental state, they are often thus forced to consider as material an act which is really of no great probative value, in order to admit such declarations as part of its *res gestae*. Hunter v. State, 40 N. J. L. 495 (1878); Chase v. Lowell, 151 Mass. 422, 24 N. E. 212 (1890); State v. Giudice, *supra;* Porter v. State, 215 S. W. 201 (Tex. 1919).

The exception to the hearsay rule admitting declarations of a state of mind is founded on sound reasoning; and it is submitted that the recognition of this distinct exception, and the abandoning of the *res gestae* doctrine as a justification for admitting such declarations, will both place this evidence on a sounder basis and restrict the prevailing tendency to extend the *res gestae* doctrine beyond all logical boundaries. See State v. Hayward, 62 Minn. 474, 65 N. W. 63 (1895).

FEDERAL EMPLOYER'S LIABILITY ACT—"COMMON CARRIER BY RAILROAD"—EXPRESS COMPANIES.—The plaintiff express company brought a bill to enjoin the defendant from enforcing a judgment, recovered for injuries, against the railroad which carried the plaintiff's express matter. The plaintiff's case rested on its contract with the defendant by which he agreed to hold neither the plaintiff nor the railroad liable for any injuries. The defendant contended that the contract was void under the Federal Employer's Liability Act. *Held:* The provisions of the Act are not applicable to express companies. The contract is valid, relief granted. Wells Fargo & Co. v. Taylor, 41 Sup. Ct. 93 (U. S. 1920).

This is the first time that the Supreme Court has decided that the terms "common carrier by railroad" of the Employer's Liability Act of April 22, 1908, c. 149, 35 U. S. Stat. at L. 65, do not cover express companies not operated by a railroad. The express company does not carry by railroad, but contracts with a railroad to do that part of its business. So although an express company is a common carrier, Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174 (1876); Grogan & Merz v. Adams Exp. Co., 114 Pa. 523, 7 Atl. 134 (1886), yet it can not properly be called a common carrier by railroad. The same conclusion has been reached under this act in New Jersey, Higgins v. Erie R. R. Co. and Wells Fargo & Co., 89 N. J. L. 629, 99 Atl. 90 (1916), and in Minnesota under a similarly worded statute of that State, State ex rel. v. District Court, 142 Minn. 410, 172 N. W. 310 (1919).

The court in the principal case said that its view was enforced by reference in the Act to engines, cars, tracks, roadbeds and other property pertaining to a railroad. A similar construction was given to the original Interstate Commerce Act which contained similar terms. *Re* Express Cases, 1 Interst. Com. Com'm. Rep. 677 (1887); Southern Indiana Exp. Co. v. United States Exp. Co., 88 Fed. 659 (1898).

INTERNATIONAL LAW—ATTESTATION BY FOREIGN GOVERNMENT THROUGH AMICI CURIAE.—Counsel for the British Embassy appeared as *amici curiae* and suggested that the process of arrest against the ship "Gleneden" should be quashed and jurisdiction over her declined because she was an admiralty transport in the service of the British Government. *Held:* The suggestion is not conclusive of the facts it states, because it was not made through the executive department of the United States. *In re* Muir, The Gleneden, 41 U. S. Sup. Ct. Rep. 185 (1921).

As a matter of international comity, each state declines to exercise by its courts jurisdiction over ships, armed or unarmed, which come within its territorial jurisdiction while in the public service of a foreign government. The

Parliament Belge, (1879) L. R. 5 P. D. 197; The Exchange, 7 Cranch 116 (U. S. 1812). A foreign government may appear in the suit and raise the jurisdictional question, The Sapphire, 11 Wall. 164 (U. S. 1871); Colombia v. Cauca Co., 190 U. S. 524 (1903); or its accredited and recognized representative may, with his government's authority, take this step in its interest. The Anne, 3 Wheat. 435 (U. S. 1818). If the foreign government properly attests the fact that the ship is a public vessel of the state, the court will not go behind this declaration nor allow it to be questioned. The Constitution, (1879) L. R. 4 P. D. 39; The Exchange, *supra*. This is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term. The Parliament Belge, *supra*.

In the principal case, the court did not think that the statement, made as it was by private counsel for the British Embassy appearing as *amici curiae*, was a proper attestation by the British Government of the fact. They therefore refused to consider it conclusive. They said: "It was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if the claim was recognized by the executive department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction." This seems to have been the method adopted in previous cases. The Constitution, *supra*; The Parlement Belge, *supra;* The Exchange, *supra;* The Pizarro, 19 Fed. Cas. 786, No. 11, 199 (1852); The Luigi, 230 Fed. Rep. 493 (1916).

JURY SERVICE—ELIGIBILITY OF WOMEN.—The defendant appealed from a conviction of larceny and assigned as error the presence of women on the jury. *Held:* The selection of women for the jury was not error. People v. Barltz, 180 N. W. 423 (Mich. 1920).

Constitutional provisions guaranteeing a trial by jury mean a trial by a jury as known at common law. Saginaw v. Campau, 102 Mich. 594, 61 N. W. 65 (1894); Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53 (1896); Slocum v. New York Life Ins. Co., 228 U. S. 364 (1913). But the qualifications of jurors is a matter subject to legislative control and even though such qualifications may differ from those at common law, such legislation is nevertheless a valid exercise of the legislative power. State v. Slover, 134 Mo. 607, 36 S. W. 50 (1896); Saginaw v. Campau, *supra*. A legislature may therefore at any time change the qualifications of the persons subject to and eligible for jury service.

The question therefore involved in the principal case, as to eligibility for jury service, is purely a statutory one and is dependent on the statutes in the various jurisdictions. In the principal case it was held that the granting of suffrage to women brought them within the provisions of the Michigan statute and made them eligible for jury service. An opposite conclusion was reached in regard to the New York statute in the case of *In re* Grilli, 110 Misc. Rep. 45, 179 N. Y. S. 795 (1920). It was there held that the granting of suffrage was not sufficient to bring women within the provisions of the New York statute so as to make them eligible for jury service. In a recent California case the

question arose as to whether a statute expressly making women eligible for jury service was constitutional. The court held that it was in violation of neither the State nor the Federal Constitution. *In re* Mana, 178 Cal. 213, 172 Pac. 986 (1918).

LANDLORD AND TENANT—LEASE DETERMINABLE BY LESSEE ONLY.—A lease for two years contained a covenant that the lease should continue thereafter from year to year until the lessee should give written notice of his intention to terminate it. The tenant held for eight years, and the lessor notified him to vacate. *Held:* Such notice was without legal effect since only the lessee could terminate the lease. Carlisle v. Weiscopf, 129 N. E. 375 (Mass. 1921).

Courts are generally opposed to leases containing covenants for perpetual renewals and make every effort to construe them so as to avoid creating a perpetuity. Hoadley v. Bayntum, 31 West. L. Rep. 751 (Can. 1915); Diffenderfer v. Board of Public Schools, 120 Mo. 447, 25 S. W. 542 (1894); Brush v. Beecher, 110 Mich. 597, 68 N. W. 420 (1896). The general rule is that a covenant in general terms to grant, at the option of the lessee, a new lease containing the same covenants and agreements as the original lease, is fully satisfied by a lease containing all such covenants except that of renewal. The effect of such a covenant is thus limited to a single renewal. Lewis v. Stephenson, 67 L. J. 296 (Eng. 1898); Drake v. Board of Education, 208 Mo. 540, 106 S. W. 650 (1907); Karn v. di Lorenzo, 111 Atl. 195 (Conn. 1920).

Although the chief objection to a covenant making a lease perpetually renewable seems to be based on the idea that the leasehold will be a perpetuity and so "against the policy of the law," Morrison v. Rossignol, 5 Cal. 64 (1855); yet, where there is a provision in a lease for extension of the term at the lessee's option, there is, upon the exercise of that option, a present demise for the full term. Neal v. Harris, 216 S. W. 6 (Ark. 1919); Kahn v. American Stores Co., 110 Atl. 562 (N. J. 1920); Briggs v. Bloomingdale Cemetery Co., 185 N. Y. S. 348 (1920). Thus, since the covenant for renewal runs with the land, Leppla v. Mackey, 31 Minn. 75, 16 N. W. 470 (1883); Cook v. Jones, 96 Ky. 283, 28 S. W. 960 (1894); McClintock v. Joyner, 77 Miss. 678, 27 So. 837 (1900); and since the interest of the lessee in the land is always vested, the rule against perpetuities is inapplicable. Bridges v. Hitchcock, 5 Bro. Parl. Cas. 6 (Eng. 1715); Muller v. Trafford, (1901) 1 Ch. D. 54; Gray, The Rule Against Perpetuities, 3rd ed., § 230.

But the right to create a perpetual lease has always been recognized; Bridges v. Hitchcock, *supra;* Copper Mining Co. v. Beach, 13 Beav. 478 (Eng. 1823); and occasionally in England, though more frequently in Ireland, such leases take the form of grants for lives renewable forever. Pilkington v. Gore, 8 Ir. Ch. R. 589 (Ireland 1858); Hare v. Burges, 4 K. & J. 45 (Eng. 1857); Swinburne v. Milburn, 9 App. Cas. 844, 855 (Eng. 1884). However, courts will give full effect to covenants making leases perpetual only when the intention of the parties to create a right of perpetual renewal is clearly and unequivocally expressed; Nicholson v. Smith, 22 Ch. D. 640 (Eng. 1882); Swinburne v. Milburn, *supra;* Swigert v. Hartzell, 20 Pa. Super. Ct. 56 (1902); Copiah Hardware Co. v. Johnson, 86 So. 369 (Miss. 1920); as where "this present covenant" is expressly included in the renewal clause. Hare v. Burges, *supra.*

In the principal case the parties provided for a perpetual lease, subject to a right of determination in the lessee; and it is submitted that such a lease is no more "against the policy of the law" than is a determinable fee. Nor can the lessor complain of the terms of his own lease, Stetler v. North Branch Transit Co., 258 Pa. 299, 101 Atl. 980 (1917); Burgener v. O'Halloran, 111 Misc. Rep. 203, 181 N. Y. S. 235 (1920); especially since they may work as well for his interests as against them. Dix v. Atkins, 130 Mass. 171 (1881); Megargee v. Longaker, Prentice Co., 10 Pa. Super. Ct. 491 (1899).

LANDLORD AND TENANT—PRIVILEGE OF RENEWAL OF LEASE—NOTICE OF INTENTION TO SURRENDER.—The defendant held under a lease for one year providing that if he held over with the lessor's consent, "it shall be deemed a renewal of this lease . . . for the term of another year, and so on from year to year until the lease is terminated by" either party giving three months notice. The defendant left at the end of the second year without giving notice. The plaintiff lessor sues to recover rent for the third year. *Held:* No notice was necessary to terminate the lease at the end of the second year. Baxter v. Maull, 75 Pa. Super. Ct. 168 (1920).

Notice of intention to remove at the end of the first year was not necessary, MacGregor v. Rawle, 57 Pa. 184 (1868), for notice is not required to terminate a lease at the end of the fixed term. Right v. Darby, 1 T. R. 159 (Eng. 1786); Cox v. Sammis, 57 N. Y. App. Div. 173, 68 N. Y. Supp. 203 (1901). The majority opinion in the principal case construed the provision for notice to apply only to the words, "and so on from year to year," and not to relate back to the immediately preceding words, "for the term of another year." The result is that notice was not necessary until after the expiration of the additional year. The judges considered the case controlled by Ashhurst v. Phonograph Co., 166 Pa. 357, 31 Atl. 116 (1895). As is pointed out in the dissenting opinion, Ashhurst v. Phonograph Co., *supra*, is clearly distinguishable from this case, the wording of the lease being significantly different. The dissenting judges emphasized the purpose of the introduction of the clause, to fix the rights of the parties in the event of a holding over after the expiration of the term certain. To quote them: "The manifest intention was to provide for a general tenancy from year to year, subject to the covenants of the lease. . . . Grammatically the condition of defeasance is applicable to all the prior clauses of the sentence, and there is nothing to indicate the intention of the parties to restrict such application." Wilcox v. Montour Iron & Steel Co., 147 Pa. 540, 23 Atl. 840 (1892).

MARRIAGE—ANNULMENT—TRIENNIAL COHABITATION.—In a suit by a wife for the annulment of her marriage *propter impotentiam* the evidence as to the husband's ability was conflicting. The wife proved cohabitation for a period of over three years and that she was still a virgin and apt. *Held:* Annulment of marriage decreed. Proof of *virgo intacta et apta viro* after three years' cohabitation is sufficient to raise a presumption of the husband's incompetency. Tompkins v. Tompkins, 111 Atl. 599 (N. J. E. 1920).

The doctrine of "triennial cohabitation" invoked in the principal case has its foundation in the civil law. This presumption has been steadfastly

adhered to in England as it was a part of the law applied in the Ecclesiastical courts which had sole jurisdiction over marriage and divorce. Lewis v. Hayward, 35 L. J. (N. S.) Prob. M. & D. 105 (Eng. 1866). As the Ecclesiastical law was never introduced into this country as a part of the Common Law, this presumption has never before been indulged in by our courts. Griffeth v. Griffeth, 162 Ill. 368, 44 N. E. 820 (1896). This presumption can arise only after a period of three years' cohabitation, Lewis v. Hayward, *supra*, and always yields to proof of the actual facts. Marshall v. Hamilton, 10 L. T. Rep. N. S. 787 (Eng. 1864); A. v. B. 1 Spinks 12 (Eng. 1853).

Although this doctrine has never before been invoked by our courts, there is no reason why the principal case should not be followed in this country. Considering the difficulty of proof in such cases and the importance of the issues involved, this is assuredly a salutary innovation into the principles of our jurisprudence which will tend to facilitate the administration of justice.

NEGLIGENCE—LIABILITY OF MAKER-VENDOR OF DEFECTIVE INSTRUMENTALITY—INJURY TO THIRD PERSON.—Defendant railroad built and sold to the United States connecting tracks into an army cantonment. They were accepted, although so negligently constructed as to be grossly and obviously unsafe. No repairs were made, and plaintiffs' decedents, while travelling under military orders, were killed in a derailment. *Held:* There was abundant evidence of negligence for the jury. Bryson v. Hines *et al.*, 268 Fed. 290 (C. C. A. 1920).

It is a general rule of law that the maker, vendor, or lessor of a defective chattel is only liable for injuries resulting from that defect, after sale or lease, to the purchaser or lessee, and not to third persons. Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891); Heizer v. Kingsland Co., 110 Mo. 605, 19 S. W. 630 (1892); Huset v. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237 (1903).

A general exception to this rule holds liable to third persons any one who sells or delivers an article known to be imminently dangerous to life or limb, without notice of its qualities. Downer v. Wellington Oil Co., 104 Mass. 64 (1870); Clarke v. Army and Navy Stores, L. R. (1903), 1 K. B. 155. This exception has been extended so as to render the vendor liable to third persons whom he knows will use the defective article without knowing of the danger, even though he has given notice to the immediate vendee. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453 (1909); O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012 (1910). It is under this extension of the exception that defendant railroad is held liable in the principal case.

Although the decision in the principal case is clearly correct, it seems questionable whether it has been based on the best possible grounds. Here, because of the patent character of the defect, the vendee was necessarily charged with knowledge of it. The attendant circumstances, however, were such as to render notice or knowledge of the defect entirely nugatory. The defendant knew that the United States was under circumstantial compulsion to accept and use the track, as soon as tendered. It was, therefore, a tort as to third persons who would necessarily use it, to tender the track in a defective condition.

However, this reasoning is even more applicable to the defendant in his capacity of maker of the defective instrumentality. If it is tortious to merely sell such an article, how much more so to be the creator of it. It was early said that "it is the duty of every artificer to exercise his art rightly and truly as he ought." Fitzherbert: De Natura Brevium, 94D (1537). This duty, unlike the general obligation of a vendor, does not spring from a contract, but is imposed by law on all persons engaging in a business in which lack of care may cause harm to others. Hence it is a duty to third persons, since they are among those who may be injured by such lack of care. The construction of tracks is clearly such a business as is required to raise this duty. It would have been better, in the principal case, to base the defendant's liability on this fundamental duty, rather than on a collateral duty of a vendor.

PLEDGES—AUTOMOBILE—NECESSITY OF DELIVERY OF POSSESSION.—A sales company pledged an automobile to a bank as collateral security for a promissory note, retaining possession of the automobile upon executing a collateral acknowledgment that they held it as the bank's trustees and agents. A receiver being appointed for the sales company and selling the automobile, the bank claimed the proceeds. *Held:* the transaction was not a pledge, since there was no delivery of possession; but the agreement created an equitable lien which the bank might satisfy out of the proceeds of the receiver's sale. Fletcher Bank v. McDermid, 128 N. E. 687 (Ind. App. 1920).

There have been few cases dealing with the attempted pledge of an automobile without delivery of possession. Failure to deliver possession prevented a pledge in *Re* Automobile Livery Service, 176 Fed. 792 (1910), and in Davis v. Billings, 254 Pa. 574, 99 Atl. 163 (1916), although in both, as in the principal case, the contract was held to have created an equitable lien in favor of the pledgee. In Wiles v. Elliotte, 215 Fed. 340 (1914), a pledgee was held not to have parted with possession by keeping the automobile in the garage of the pledgor, it being determined that the pledgor held the car as bailee and not as owner. So a pledgee was held to have retained possession, although the pledgor, who was in his employ as a driver of his auto-stage line, had control of the car. Manor v. Dunfield, 33 Cal. App. 557, 165 Pac. 983 (1917).

It was urged by counsel in the principal case that an automobile comes within that class of chattels which, because of their bulky character, need not be actually delivered to make a pledge of them valid; but it was answered that an automobile, while it is bulky, is easily delivered, being movable by its own power. Other reasons urged for treating the transaction as a pledge included: the great activity in the manufacture and sale of automobiles, the consequent demand for financial assistance through pledging them as security, and the great inconvenience to a pledgee in caring for them. But it is proper that these practical considerations should not affect the settled point of law involved. It is elemental that delivery of possession is necessary to constitute a valid pledge, and logically there is no reason why this element should be disregarded in the case of automobiles.

PRACTICE—FACTS ADMITTED IN PLEADINGS AS EVIDENCE UNDER PRACTICE ACT OF 1915.—Plaintiff, to prove the existence of the contract sued on, tendered

in evidence certain relevant averments of the statement of claim, with admissions concerning it contained in the affidavit of defense. On review of the refusal of a motion to take off a non-suit, there was no assignment of error attacking the admission of the evidence. *Held:* The record must be accepted as made with the facts as they appear in evidence, whether rightfully or wrongfully admitted, appellant not having assigned the acceptance of these proofs as error. Buehler v. United States Fashion Plate Co. (Pa. Supreme Court, 1921, not yet reported).

This decision, in laying down certain guiding rules of practice, clarifies a point left open by the Practice Act of 1915 (P. L. 483), as to the extent to which admissions in the pleadings are evidence for purposes of trial. The Act provides by section 6 that "every allegation in plaintiff's statement . . . if not denied specifically or by necessary implication in the affidavit of defense . . . shall be taken to be admitted." The court in its opinion states that while a fact averred in the statement of claim and not specifically denied in the affidavit of defense is an admitted fact, it does not become such for purposes of trial unless put before the jury in one of three ways: (1) by the presiding judge stating to the official stenographer, in the presence of counsel, that certain facts, which he details and directs to be placed on the notes of trial, are averred in the statement and not denied in the affidavit, and hence must be treated as admitted; or (2) by counsel directing to be placed on such notes certain detailed facts, which they admit; or (3) by offering in evidence specific parts of the statement of claim, with what counsel conceive to be the replies thereto contained in the affidavit of defense, and having the facts thus sought to be established placed on the notes of trial as admitted, because averred in the statement and not denied in the affidavit.

This point had not before been definitely settled by the Supreme Court. The decision in an earlier case showed a contrary inclination where on a rule for judgment for want of a sufficient affidavit of defense it was held that under the Act the undisputed facts appearing by the pleadings are admitted for all purposes of the case. Federal Sales Co. v. Farrell, 264 Pa. 149 (1919). And in another case the Washington County Court had reached the opposite conclusion in holding that if averments are not denied they are taken to be admitted for all the purposes for which the affidavit is required to be filed; and that if the case be on trial before a jury, then every allegation of fact not denied as aforesaid is to be treated as admitted for the purposes of the trial. Herron v. Florence Presbyterian Church, 46 C. C. 287 (Pa. 1918); 35 Lanc. 240; 27 D. R. 1025.

SALES—EXPRESS WARRANTY—AS TO A FUTURE FACT.—Plaintiff brought an action to recover the purchase price of a quantity of seeds delivered to the defendant. The defendant set up that the plaintiff warranted the seeds would grow; that the seeds failed to germinate and therefore on account of his breach of warranty the plaintiff could not recover. *Held:* There was a breach of warranty and the plaintiff could not recover on the contract. Western Soil Bacteria Company v. O'Brien Bros. Inc., 194 Pac. 72 (Cal. 1920).

The rule as laid down by Blackstone was that "a warranty can only reach the things in being at the time of the warranty made, and not the things *in*

futuro, as that a horse is sound at the buying of him and not that he will be sound two years hence." 3 Comm. 165. While there is a tendency to get away from the Blackstonian conception, nevertheless in the ordinary contract of sale a warranty is generally held to apply only to that state of things existing at the time the warranty was made. Stamm v. Kuhlman, 1 Mo. App. 296 (1876); Leggat v. Sands Ale Brewing Co., 60 Ill. 159 (1871). However, if the words are explicit that the warranty should attach as to a future event, there would seem to be no reason why it should not be considered valid and some courts are inclined to take this view. Conger v. Chamberlain, 14 Wis. 259, *semble*, (1861). Zinn v. Hyatt, 60 Mo. App. 627 (1895), as to the future capacity of an animal. Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. 143 (1892), that a blemish on a horse would disappear.

A warranty that seeds would grow has generally been held to be a good warranty. Cline v. Mock, 150 Mo. App. 431, 131, S. W. 710 (1910); Shaw v. Smith, 45 Kan. 334, 25 Pac. 886 (1891). Although this would seem to be a warranty as to a future event, and the courts could properly so decide, it is not, as a rule, considered such. The view has been taken that it is a warranty of the germinating power of the seeds, which is a warranty of their present capabilities to grow and therefore a warranty of a present fact. Rieger v. Worth, 127 N. C. 230; 37 S. E. 217 (1900); Landreth v. Wyckoff, 67 N. Y. App. 145; 73 N. Y. Supp. 388 (1901).

The principal case might properly have been considered as an express warranty with regard to a future fact. As such it would have been an excellent example of the modification of the Blackstonian rule. However, from the court's reasoning it is not apparent whether they took this view, or whether they relied on those cases which consider such a warranty a representation as to the germinating power of the seeds. While it can undoubtedly be said the case is correctly decided, it is to be regretted that the court did not state on what theory its conclusion was based.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—NATURE OF THE EMPLOYMENT.—The crane, on which the injured employee worked, was being used for unloading coal cars in the defendant's yard, so as to create a coal reserve which could be used in both interstate and intrastate commerce in case of a threatened strike. *Held:* The employee could not recover under the Federal Employer's Liability Act since the crane was not being used in interstate commerce. Kozimko v. Hines, Director General of Railroads, 268 Fed. 507 (1920).

The Supreme Court of the United States has held that the true test for determining the character of the employment is: Was the employee at the time of injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it? Pederson v. Del., Lack. & West. R. R., 229 U. S. 146; Shanks v. Del., Lack. & West. R. R., 239 U. S. 556 (1915). By the application of this test, the employee was held to be engaged in interstate commerce, where he was carrying bolts to repair a bridge which was regularly used in both interstate and intrastate commerce, Pederson v. Del., Lack. & West. R. R., *supra;* and where he was operating a pump which filled a tank from which engines in both commerces were supplied. Erie Railroad Company v. Collins, 253 U. S. 77 (1920). These cases seemed to turn upon the fact that the work

done related to permanent instrumentalities of commerce. It has been held, however, that the test would not bring under the Federal Employer's Liability Act an employee who was engaged in the construction of a new instrumentality of commerce: an instrumentality which was in the future to be used for interstate commerce, but which had never been devoted to it. Pederson v. Del., Lack. & West. R. R., *supra;* Bravis v. Chicago, Mil. & St. Paul Ry. Co., 217 Fed. Rep. 234 (1914).

It has also been held under the same test that the employment was not interstate, where the employee was mining coal intended for future use in interstate commerce, Del., Lack. & West. R. R. v. Yurkonis, 238 U. S. 439 (1914); where a switchman was engaged in removing coal cars from the storage yard to the track alongside of the coal chutes into which it would subsequently be unloaded for later use by engines engaged in interstate commerce, Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177 (1915); or where the employee assisted in placing cars containing supply coal upon an unloading trestle, Lehigh Valley Railroad Company v. Barlow, 244 U. S. 183 (1916).

The character of the employment in the principal case is certainly as remote from interstate commerce as was the employment in Chicago, Burlington & Quincy R. R. v. Harrington, *supra.* Consequently, the principal case was properly controlled by that case unless it could be said that the crane was a permanent instrumentality of commerce within Pederson v. Del., Lack. & West. R. R., *supra.* This, it is submitted, would not be warranted by the facts.

BOOK REVIEWS

THE UNITED STATES OF AMERICA. A Study in International Organization. By James Brown Scott, A.M., J.U.D., LL.D. Oxford University Press, New York City, 1920, pp. xix, 605.

The fallacy of this elaborate and expensive volume is sufficiently indicated in its title. The United States is *not* a study in international organization and never was. Nearly three-quarters of the present State boundary lines were laid out by theodolite and compass, operated by the national surveyor; only one of the States ever fought a foreign war or ever possessed those prerogatives of sovereignty in relation to sister States which the great states of the world regard so jealously. In the words of Madison, whom Dr. Scott so delights to quote, spoken on the floor of the Constitutional Convention: "The States never possessed the essential rights of sovereignty. These were always vested in Congress. The States at present [1787] are only great corporations having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederacy."

The title of the central chapter of the volume, "Prototype of a Court of International Justice," is equally misleading. The "Prototype" referred to is the Supreme Court of the United States. But as Dr. Scott is clearly aware, the Supreme Court is the judicial branch of a government vested with coercive powers over the individual citizens of the States composing the Union; and,